defence counsel, she stayed execution of the sentence pending appeal. Bail of $40,000 in two sureties was allowed and the bail bond was duly executed on March 6, 1987. The bailors were Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha.

But the evidence was clear that the police process servers had not served notices on them to produce the accused for the scheduled date of the hearing at the High Court; they had served on two other persons instead.

To my mind, no proof had been shown that the bond has been forfeited. The Deputy Public Prosecutor conceded that they should be discharged. And I accordingly discharged them from having to show cause.

*Order accordingly.*

Solicitors: *A. Malik & Lawrence Tan.*

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## CHEE LUI TEEN v. KIET HOE DEVELOPMENT SDN. BHD.

**[O.C.J. (Lim Beng Choon J.) November 21, 1987]**

**[Alor Setar – Civil Suit No. 141 of 1982]**

*Land Law – Agreement to transfer land – Increase in area – Rectification of agreement – Application for – Compensation sought – Principles on rectification – Whether rectification an appropriate remedy.*

The defendant company wanted to develop certain lands including two lots on which the plaintiff had erected certain buildings. In order to acquire vacant possession of the said lands, the defendant company decided to transfer another land (Lot 36) to the plaintiff. The latter undertaking was embodied in a written agreement. Thereafter, due to certain governmental planning, the area of Lot 36 was increased considerably. The defendant company therefore sought compensation for the increased land from the plaintiff which the plaintiff refused to give. The defendant company filed a counterclaim seeking rectification of the agreement or alternatively compensation for the increased land.

**Held,** dismissing the counterclaim: (1) the principles advocated in the cases cited clearly show that a court should be cautious in allowing a rectification of any written instrument. It is not the function of the court to re-write an agreement which the parties had entered into nor should it allow a party who subsequently found that the terms of the agreement were unfavourable to him, and to avoid performance, sought the assistance of the court to rectify it under the guise that the agreement did not reflect the common intention of the parties;

(2) there was no mistake whatsoever in the making of the agreement. It fully contained what had been agreed by both parties prior to the signing of the agreement;

(3) rectification is certainly not the proper remedy in cases of this nature.

*Cases referred to:*

(1) *Siddique & Co.* v. *Utoomal & Assudamal & Co.* A.I.R. 1946 P.C. 42.
(2) *May* v. *Platt* [1900] 1 Ch. 616.
(3) *Frederick E. Rose* v. *William H. Pim* [1953] 2 Q.B. 450.
(4) *Oh Hiam & Ors.* v. *Tham Kong* [1967] 1 M.L.J. 65.
(5) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.
(6) *Yuson Bien & Anor.* v. *Bankers Trust Co. Ltd.* [1980] 1 M.L.J. 32.

CIVIL SUIT.

*George John* for the plaintiff.
*S. Visvanathan* for the defendant.

*Cur. Adv. Vult.*

**Lim Beng Choon J.**: This action has a rather chequered history. However, for the purpose of this judgment I do not think it is necessary for me to set out the events that took place prior to the hearing of the case before me on June 22, 1986. Suffice it to say that originally Chee Lui Teen, who was the plaintiff in Civil Suit No. 141 of 1982, sued Kiet Hoe Development Sdn. Bhd. as defendant, and in this suit the plaintiff prayed for an order of specific performance in respect of an agreement in which the defendant company had agreed to transfer the plaintiff without payment of money, the land comprised in Lot 36 now held under title HS(M) 477/1981 Mukim Alor Malai, Kedah. The action by the plaintiff was, however, settled before the trial of this case. It follows therefore that the only remaining part of the action is the counterclaim made by the defendant company (hereinafter referred to as the company) and the defence to the counterclaim by the plaintiff (hereinafter referred to as the defendant to the counterclaim).

Briefly the facts are as follows. The company intended to develop their land comprising several lots inclusive of Lots 28 and 30 in the Mukim Alor Malai, District of Kota Star, into a housing estate. At that time, the defendant to the counterclaim had erected a house and a shrine on the two Lots 28 and 30 apparently with the consent of the company or their predecessor. In order to acquire vacant possession of these two lots to

enable the company to develop the land, it was agreed between the company's representative and the defendant to the counterclaim that in consideration of the defendant to the counterclaim moving his house and the shrine to Lot 36 which was also owned by the company the latter agreed to transfer the land comprised in the said Lot 36 to the former upon the issue of a sub-divided title deed. The defendant to the counterclaim agreed to the proposal and as a consequence a written agreement was made. The agreement was made on June 15, 1981 ("the agreement") and the most important clause in that agreement is clause 2 whereby it is stated that:

"The first party (the company) agrees to transfer to the second party (the defendant) without any payment of money, the land comprised in Lot 36 as marked red on the plan annexed hereto upon the issue of the sub-divided title deed to the said Lot 36. The solicitors' costs as disbursement in respect of the transfer shall be borne by the second party."

Another important clause is clause 3 where it is stated:

"The second party shall remove the said house and the said shrine from its present site to the said Lot 36 within 24 weeks from the date of the signing of the agreement."

Annexed to the agreement was a layout plan of the area of development to be carried out by the company (the layout plan). The land comprised in Lot 36 was shaded in red and it was a triangle piece of land measuring, according to PW1, 140 feet by 87 feet by 145 feet. The company's representative had inscribed his signature on the said plan. However, prior to the signing of the agreement the layout plan was submitted to the Bandaraya Kota Star for approval and it was duly approved in principle and on this assurance the company therefore entered into the said agreement with the defendant to the counterclaim. In shifting the house and the shrine to Lot 36, the defendant to the counterclaim had to expend some $10,000 for demolishing the house and building another house in the said lot.

It is rather unfortunate for the company that the Alor Setar Survey Department was not agreeable to the approval of the layout plan and the reason for their disagreement was that Lot 36 should be earmarked as land for further development and also for future extension of the road running adjacent to that lot. The company therefore had to submit a new layout plan and upon approval of the plan, the Land Office approved a sub-division of Lot 36 and issued a new title HS(M) 477/1981. As a consequence of the new sub-division, the area of the land comprising HS(M) 477/1981 is now 7,270 square feet which is of course almost 50% more than the area of the original land comprised in Lot 36. It is quite understandable that since the area of that land increased considerably in size, the company required the defendant to the counterclaim to pay compensation for the difference in respect of the additional land comprised in HS(M) 477/1981. The defendant to the counterclaim relied strongly on clause 2 of the said agreement and refused to make additional payment notwithstanding that he had the advantage of a much larger land than was agreed upon. Consequently, the company filed the counterclaim whereby they claimed for a rectification of the said agreement. Alternatively, they prayed for an order requiring the defendant to the counterclaim to pay compensation in respect of the additional land which he had obtained. The company based their claims on the ground that the parties agreed to transfer the land comprised in Lot 36 which was approximately 4,862 square feet and not the land comprised in HS(M) 477/1981 which was 7,270 square feet in area. Hence the defendant to the counterclaim had acquired the additional land which was not part of the bargain.

On the other hand, the defendant to the counterclaim contended that it was the intention of the company and the defendant to the counterclaim at all material times that the former would transfer the land as specified in clause 2 of the agreement in consideration of the latter's removal of his house and shrine to Lot 36. Furthermore, it was contended that the defendant to the counterclaim would rely on statutory estoppel or alternatively on the doctrine of promissory estoppel to deny the company of their counterclaim. Particulars giving rise to estoppel were set out in the defendant's reply to the counterclaim and defence to counterclaim (see page 12 of the bundle of pleadings). The gist of the said particulars was that since the company had by the agreement declared that they agreed to transfer the land comprised in Lot 36 as marked in red on the plan annexed to the agreement upon the issue of a sub-divided title deed to the said Lot without any payment of money, the company had caused the defendant to the counterclaim to believe that the aforesaid declaration was true. It was on the reliance of the said declaration that the defendant to the counterclaim agreed to remove his house and shrine to Lot 36. Hence the company is now precluded from

requesting the defendant in the counterclaim for additional payment.

At the trial, the defendant to the counterclaim chose not to call any evidence and elected to stand by his contention that the company had failed to make out a case. In his submission, the learned defence counsel relied strongly on clause 2 of the agreement exhibit P1 and contended that the said clause was clear and unambiguous. There was no mistake still less a common mistake as to the matter upon which the parties had agreed. There is therefore no reason at all for the company to urge on this court to rectify the agreement. Furthermore, when the original layout plan as annexed to the agreement was substituted by a new layout plan, the company had never communicated with or obtained the consent of the defendant to the counterclaim and more importantly when the company, on the direction of the Survey Department, had substituted the said layout plan with a new one the company should have applied to rescind the agreement on grounds of frustration. Finally the learned defence counsel raised the issue of estoppel as particularized in the said reply and defence to the counterclaim as adumbrated earlier in this judgment.

The learned counsel for the company, on the other hand, contended that the crucial words in clause 2 of the agreement are "the land comprised in Lot 36" which, if read with the plan annexed to the agreement showing the land in dispute as marked in red, were clear indications that the company agreed to transfer the land in Lot 36 comprising 4,826 square feet only. PW1 in his evidence had said quite unequivocally that prior to the signing of the agreement both parties were fully aware that the area of the land was 4,862 square feet as he, representing the company, and the defendant to the counterclaim had both scrutinized the layout plan. Furthermore, he had inscribed his signature on Lot 36 which was marked in red. The dimensions of the land comprised in Lot 36 were stated in the plan as 140 feet by 143 feet by 87 feet which according to PW1 would work out to 4,862 square feet. There was never any agreement, so said the learned counsel, that the defendant to the counterclaim should have the land comprising in the title HS(M) 477/1981 Lot 2397 with an area of 7,270 square feet. The difference of 2,408 square feet was approximately one half times the size of the original land referred to in the agreement.

As the only remedy sought by the company is the rectification of the agreement, it is necessary for me to consider the circumstances with which a court could legitimately exercise its jurisdiction of rectification. It is no doubt true that the object of a suit for rectification is to bring a document which was intended to give effect to a prior agreement into harmony with that prior agreement. The antecedent agreement must be clear and unequivocal and must have continued unchanged until the execution of the final document. It must therefore be proved that the final document did not carry out the parties' earlier and unchanged agreement. This proposition is well exemplified in *Siddique & Co.* v. *Utoomal & Assudamal & Co.*[1] where Lord Thankerton said:

> "In this appeal it became obvious that there was one crucial point, the decision of which might supersede consideration of any further points. Their Lordships wish to recall the essentials which have to be proved under section 31, Specific Relief Act 1877. The plaintiffs (the present respondents) must prove that it was through *a mutual mistake* of the parties that the three contracts in question *did not truly express the intention of* the parties; and the duty of the court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument, and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements, it is in the discretion of the court to grant rectification." (My emphasis)

In the English case of *May* v. *Platt,*[2] Farwell J. put the principle in this way, at p. 623:

> "I would point out, however, that the counterclaim asks only for rectification. In my judgment, in order to get rescission after conveyance, the allegations would have had to be very different. I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romilly in *Harris* v. *Pepperell* [L.R. 5 Eq. 1] and *Garrard* v. *Frankel* [30 Bear. 445] and perhaps Bacon V.C. in *Paget* v. *Marshall* [28 Ch. D. 255] appear to have shrunk from stigmatizing the defendants' conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have had no jurisdiction to grant the relief that they did in the absence of fraud."

The scope of the jurisdiction of a court to allow rectification is explained in greater clarity in *Frederick* v. *William H. Pim*[3]. There the plaintiffs received an order from a third party for "Moroccan horse-beans described as feveroles". They asked the defendant what "feveroles" were; the defendants replied that they were just horse-beans and that they could supply them. Negotiations accordingly took place between the plaintiffs and the defendants on that basis. The parties agreed to buy and sell horse-beans and that agreement was embodied in a written contract. The

defendants delivered horse-beans to the plaintiffs who in turn delivered them to the third party who, having accepted them, successfully claimed damages on the ground that they were not feveroles. The plaintiffs claimed rectification of the written contract with the defendants, so that it was for the supply of feveroles. The trial judge found that both parties had made an oral agreement by which they intended to deal in "horsebeans of the feveroles type" but that owing to a mutual mistake innocently induced by the seller's representative, all the written contracts were for horse-beans; and he allowed the rectification asked for by the plaintiffs. The defendants went on appeal to the Court of Appeal. The panel of judges who sat and heard the appeal comprised Singleton, Denning and Morris L.JJ. It is useful to extract some of the passages from the respective judgments of the three judges to assist me in appreciating the scope of this court's jurisdiction to grant a rectification of an agreement. In this respect, Singleton L.J. at p. 458 said:

"Still, it is necessary to ascertain what the contract was. The offer clearly was Tunisian horse-beans. It was so treated by the plaintiffs in their cable to Rose (Middle East), who accepted it the same day. On acceptance by the plaintiffs a slip was made out in the defendants' office, and that formed the groundwork of the contract. The oral contract between the plaintiffs and the defendants was in fact for 500 tons of Tunisian horse-beans, and the written contract was in the same terms. In those circumstances, a claim to rectify the written contract by adding the word 'feveroles' cannot succeed. The written contract is in the same terms as the oral contract. Whatever remedies the plaintiffs might have, or might have had, rectification is not one of them."

Denning L.J. approached the issue in this way:

"Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that *it is, by a common mistake, wrongly expressed in the document,* then you rectify the document; but nothing less will suffice." (My emphasis)

Morris L.J. likewise adopted a same approach when he said at p. 463:

"It seems to me clear beyond doubt that both parties proceeded on the basis that 'feveroles' and 'horse-beans' were the same. The plaintiffs' representatives expressed the matter succinctly when he said: 'I had agreed to buy because feveroles were horse-beans and horse-beans were feveroles.' In that belief the parties came to agreement, and the formal written contracts were prepared and signed. The parties had throughout a clear common intention and purpose of buying and selling horse-beans, and their written agreements faithfully embodied and exactly recorded what they had agreed. In these circumstances it seems to me that no claim for rectification can succeed."

Turning to Malaysian cases, I find guidance in the case of *Oh Hiam & Ors.* v. *Tham Kong*[4] where Gill J. (as he then was) gave a very lucid summary of the requirements with which a plaintiff has to comply before he can successfully urge the court to grant him the equitable remedy of rectification. Thus his Lordship said at p. 70:

"It is clear from the authorities that, although the agreement in the present case is not a nullity, the courts in England would order rectification of such an agreement provided the following conditions are satisfied: (a) there must be an actually concluded *contract antecedent* to the instrument to be rectified, as the court will not make a new agreement for the parties; (b) there must be clear evidence of the real intention; (c) there must be a mistake common to both parties, and it must have *existed at the time of the execution of the instrument;* (d) the mistake must be exactly proved, *i.e.* the plaintiff must show the precise form in which the instrument ought to be drawn up and (e) the mistake must be one of expression only. A written contract or a deed may be rectified even if the parties can no longer be restored to the position occupied when the contract was made, and even though the mistake has been embodied in a deed of conveyance. Extrinsic and even parol evidence will be admitted to ascertain the true intent of the parties, notwithstanding that the contract is one which is required to be under seal or one which the Statute of Frauds requires to be evidenced in writing."

The proposition advocated by Gill J. was confirmed by the Privy Council when that case went on appeal before it – see *Oh Hiam & Ors.* v. *Tham Kong*[5]. Another case to which reference may be made is *Yuson Bien & Anor.* v. *Bankers Trust Co. Ltd.*[6] where the following passage in the judgment of Wan Suleiman F.J. (as he then was) appearing at p. 35 is pertinent:

"The terms of proposal of the respondents were unambiguous and unmistakable and the answer of the appellants when the agreement was endorsed was an unequivocal and unconditional acceptance. Consequently the appellants were bound in the absence of fraud or warranty however clearly they might afterwards make it appear that they were labouring under a mistake in their acceptance of the proposal. They cannot be allowed to escape from the effect of the agreement by merely showing that they understood the terms in a different sense from that which the terms bear in their legal effect. In *Earl* v. *Hector Whaling Ltd.*[ [1961] 1 Lloyds Rep. 459, 471] Harman L.J. agreed with Simonds J. in *Crane* v. *Hegeman-Harris Co. Inc.* [[1939] 1 All E.R. 662] 'that you do not need a prior contract but a prior common intention.' The burden of proving

this common and continuing intention lies upon the party who claims that the written contract should be rectified: *Tucker* v. *Bennett* [(1987] 38 Ch.D. 1, 9]. If the evidence is such as to satisfy one that common intention did not appear in the written document then there is a case for rectification."

The principles advocated in the cases cited above clearly show that a court should be cautious in allowing a rectification of any written instrument. It is not the function of the court to re-write an agreement which the parties had entered into nor should it allow a party who subsequently found that the terms of the agreement were unfavourable to him, and to avoid performance of the agreement, sought the assistance of the court to rectify it under the guise that the agreement did not reflect the common intention of the parties.

Transposing the aforesaid principles to the instant case, it is clear as to what exactly the parties had agreed and that is that the company agreed to transfer to the defendant to the counterclaim without any money the land comprised in Lot 36 as marked in red on the annexure to the agreement. The shape and the size of the land was stated in the plan which PW1 said was triangular in shape consisting of 4,862 square feet. PW1 was very unequivocal when he said:

"Both the parties were aware that the area of the land was 4,862 square feet as both of us had looked into the plan. I have initialled my name in the land next to Lot 36."

He also confirmed that the company agreed to transfer the land in Lot 36 to the defendant to the counterclaim in consideration of his agreeing to shift his house and his shrine from Lot 28 and Lot 30 to the said Lot 36 to enable the company to develop Lot 28 and Lot 30. In the result, it cannot therefore be said that the final written instrument did not carry out the antecedent agreement. It is also important to note that it was only after the Bandaraya Kota Star had approved the original layout plan in principle that the agreement was entered into by the parties. It is therefore not unfair to say that the company was relying on the approval which it had obtained from Bandaraya Kota Star in respect of the layout plan when it entered into the agreement with the defendant to the counterclaim and the approved layout plan was annexed to the agreement. On the other hand, the defendant to the counterclaim had nothing whatsoever to do with the transactions that were carried out between the company and the Bandaraya Kota Star officials. All he knew was that he was offered the land comprising in Lot 36 with an area of 4,862 square feet and he had accepted the same. There was no mistake whatsoever in the making of the agreement. It fully contained what had been agreed by both parties prior to the signing of the agreement. The company could have inserted an additional clause to safeguard itself by providing that should the area of the land comprised in Lot 36 exceed 4,862 square feet the defendant to the counterclaim had to pay for the additional land at a certain price. It is obvious that in the circumstances, such a provision had never entered the minds of the company's authorized representatives since the layout plan had already been approved by the Bandaraya Kota Star. The substitution of the layout plan was never in the mind of either party. In such a state of affairs, can the company now come running to this court to ask for rectification of the agreement when due to an intervening action by a third party the terms of the agreement had become unfavourable or more onerous. The answer must be in the negative. Rectification is certainly not the proper remedy in cases of this nature. There may be other more appropriate remedies to which the company could resort but to my mind rectification is certainly not available to it.

For the above reasons, the counterclaim is dismissed with costs.

*Order accordingly.*

Solicitors: *George John & Co.; Syarikat Visva.*

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## MOBIL OIL MALAYSIA SDN. BHD. v. OFFICIAL ADMINISTRATOR, MALAYSIA

**[O.C.J. (Peh Swee Chin J.) November 10 & 16, 1987]**

**[Ipoh – Civil Suit No. 21-125-86]**

*Constitutional Law – Ruler of state – Deceased – Estate of – Suit against administrator of – Unconditional appearance – Defence of royal prerogative of immunity – Whether appearance amounted to submission to jurisdiction of court – Federal Constitution, Art. 181 – Perak Constitution, Arts. X, XI & XII – "Sanctity ... to the person of the sovereign" – "Sovereign can do no wrong".*

The plaintiff claimed against the estate of the late Sultan of Perak for a sum of money, being the price of diesel oil supplied to a mining company of which the late Sultan was the sole proprietor.